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October Term, 1998

ADELA NAJAR VDA. DE PANTA, individually and as personal representative of the estate of Agustín Panta Pazos; EDGAR PANTA NAJAR; ROSA DEL CARMEN PANTA NAJAR; ELVIS ANDERSON PANTA NAJAR,

*Petitioners,*

*-v-*

AFRAM CARRIERS, INC.,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Is a court required to conduct fundamental fairness review of forum selection clauses prior to enforcement and, if so, does the court err by declining to consider uncontroverted evidence that a forum selection clause included in a wrongful death settlement is unreasonable because of fraud, overreaching, unilateral mistake and duress, merely because that evidence also tends to establish that the settlement itself was fraudulently induced?

2. Does public policy preclude enforcement of a forum selection clause negotiated after initiation of a limitation of liability proceeding and without disclosure of the proceeding to the resisting party, when enforcement carves out some but not all claims from the proceeding in violation of the concursus principle requiring all such claims to be litigated in the same proceeding?

3. Does judicial estoppel preclude a shipowner who has offensively invoked a Limitation Act proceeding and continues to litigate actively in that proceeding against many claimants from requesting that the court enforce a forum selection clause, obtained from potential claimants after commencement of the proceeding without notice to them of that proceeding, the effect of which is to exclude only those claimants from the still-pending Limitation Act proceeding?

4. Whether the Court should exercise its supervisory power to intervene and consider arguments properly raised, preserved and briefed on appeal, but not addressed by the Fifth Circuit in consideration of the instant case?

## PARTIES TO THE PROCEEDING

Petitioners are Adela Nájar vda. de Panta, individually, and as personal representative of the Estate of Agustín Panta Pazos, Edgar Rahl Panta Nájar, Rosa del Carmen Panta Nájar and Elvis Anderson Panta Nájar, Mr. Panta's survivors, entitled to assert claims related to his death and are referred to thoughout as the "Panta claimants" or "the Pantas."

Respondent is Afram Carriers, Inc. ("Afram" or "the shipowner") a wholly -owned subsidiary of the Kirby Corporation, and former owner of the SS TAMPA BAY. Afram Carriers, Inc., as owner of the SS TAMPA BAY, is Petitioner in the underlying limitation of liability case.

Kirby Corporation is the parent corporation of Afram Carriers, Inc. and has been impleaded into the limitation proceeding by the other claimants.

Anchor Fumigation & Pest Control, Inc. is a third party defendant in the underlying proceeding and a defendant in the related case, C-97-389, pending before the Honorable H.W. Head, Jr. in the Corpus Christi Division.

Bruce Moeykens, Sacramento Garza, Francisco De La Fuente, Thomas Blair Corrales, Cruz de Jesus Hernandez, Abelardo Leiva, Robert B. Neal, Jane Lunning and Edward Shimel are each personal injury claimants to the underlying fund.

Van Waters & Rogers, Inc., AmeriBrom, Inc., Great Lakes Chemical Corporation, Bromide Compounds, Ltd. and the Dead Sea Bromide Group, Cooperative for Assistance

and Relief Everywhere, Inc. ("CARE") and Mueller Shipping Company are each Third Party defendants against the allegations of Afram Carriers, Inc.

The Cooperative for Assistance and Relief Everywhere, Inc. ("CARE") and the United States of America are cargo claimants

The individuals and entities listed in 3-7 are litigants in the underlying litigation, but were not involved in the appeal from which review is sought.

## TABLE OF CONTENTS

Questions Presented For Review ..... i

Parties to the Proceeding ..... ii

Table of Contents ..... iv

Table of Authorities ..... vi

Citation to Opinions and Orders ..... 1

Basis for Supreme Court Jurisdiction ..... 1

Constitutional and Statutory Provisions Involved ..... 1

Statement of the Case ..... 1

Arguments in Support of Petition ..... 5

I. This Court Should Grant The Petition For Writ Of Certiorari To Clarify Both That Courts Are Obligated To Conduct A Fundamental Fairness Review Of Forum Selection Clauses, As Well As The Scope Of The Evidence And Considerations Relevant To Such Review. Because No Clear Guidance Exists On This Point, The Fifth Circuit Ignored Substantial Evidence That Showed This Clause To Be Fundamentally Unfair And Held That A Forum Selection Clause Inserted By A Shipowner In A Wrongful Death Settlement Can Be Enforced To Exclude Only Some Claimants From A Pending Limitation Of Liability Case Despite The Fact That It Serves No Reasonable Purpose And Tends To Cause Multiplicity Of Litigation. ..... 5

II. The Court Should Grant The Petition For Writ Of Certiorari To Provide Guidance To The Lower Courts For Determining When Enforcement Of A Forum Selection Clause Violates Public Policy. The Absence Of A Clear Rule Has Resulted In A Lack Of Uniformity In Decisions Interpreting Closely Analogous Issues. .... 12

III. The Court Should Grant The Petition For Writ Of Certiorari To Formulate A Uniform Rule For Determining When A Party Is Judicially Estopped From Obtaining Inconsistent Relief In A Legal Proceeding ..... 19

IV. The Court Should Grant The Petition For Writ Of Certiorari Because The Panels Failure To Address Numerous Issues Properly Raised, Preserved And Briefed On Appeal So Far Departs From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of The Courts Supervisory Power ..... 21

Conclusion ..... 25

Appendix

Exhibit A - Circuit Court Opinion ..... 1a

Exhibit B - District Court Decision ..... 15a

Exhibit C - Order Denying Petition for Rehearing ... 16a

Exhibit D - District Court Order dated 6/20/97 ..... 17a

Exhibit E - District Court Order dated 9/29/97 ..... 20a

Exhibit F - Constitutional and Statutory Provsions ..... 21a

## TABLE OF AUTHORITIES

Cases

*Bates v. Long Island Ry. Co.*, 997 F.2d 1028, 1037 (2d Cir.), *cert. denied*, 114 S.Ct. 550 ( 1993) ..... 20, 21

*Carnival Cruise Lines vs. Shute*, 499 U.S. 585 (1991) ..... 6-8, 18

*Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 517 (5th Cir 1997) ..... 20

*Garrett v. Moore-McCormack*, 317 U.S. 239, 252 (1942) ..... 11

*Hartford Accident Co. v. Southern Pacific*, 273 U.S. 207, 214 (1947) ..... 16

*Haynsworth vs. The Corporation*, 121 F.3d 956 (5th Cir. 1997) ..... 6

*Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984) ..... 20

*Jones vs. Weibrecht*, 901 F.2d 17, 18-19 (10th Cir. 1990) ..... 15

*Kaneb Services, Inc. v. Federal Sav. and Loan Ins. Corp*, 650 F.2d 78, 81 (5th Cir. 1981) ..... 19

*Marinechance Shipping vs. Sebastian* 143 F.3d 216 (5th Cir. 1998) ..... 8

*Maryland Casualty Company v. Cushing*, 347 U.S. 409, 415 (1954) ..... 16, 18

*Morris v. State of California*, 966 F.2d 448, 453 (9th Cir. 1991) ..... 20, 21

*Mosely vs. Electronic Facility*, 374 U.S. 167, 171 (1962) ..... 7, 11

*Stewart Organization vs. Ricoh*, 487 U.S. 22, 31 (1988) ..... 12

*The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ..... 5, 12, 14

*The Francis Parkman*, 80 F.Supp. 22 (D.C. S.D. N.Y. 1948) ..... 11

*The Quarrington Court*, 102 F.2d 916, 918 (2d Cir. 1939) ..... 13, 14

*UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 113 S. Ct. 3069 (1993) ..... 20

*United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986) ..... 20

Other Authorities

Gilmore & Black, The Laws of Admiralty, 10-4(a) (2nd Ed. 1975) ..... 18

Rules and Regulations

S. Ct. Rule 13.1 and 13.3 ..... 1

Statutes

28 USC § 1254(1) ..... 1

28 USC § 1404(a) ..... 12

46 U.S.C. § 181 ..... 1, 3

## OPINIONS BELOW

All opinions below are contained in the appendices to this Petition. The United States District Court for Southern District of Texas, Houston Division, entered two orders. The first, dated June 26, 1997 and entered June 30, 1997, is reproduced at App. 17a. The second, dated September 26 and entered September 29, 1997, is reproduced at App. 20a. The Opinion of the United States Court of Appeals for the Fifth Circuit, decided June 26, 1998, is reported at 145 F.3d 298 (5th Cir. 1998) and is reproduced at App. 1a. The Opinion of the United States Court of Appeals for the Fifth Circuit filed August 20, 1998 denying Petitioners' Petition for Rehearing and Suggestion of Rehearing En Banc is reproduced at App. 16a.

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit entered judgment on June 26, 1998 and denied a timely request for rehearing on August 20, 1998. This Courts jurisdiction is invoked under 28 USC § 1254(1). The petition is timely pursuant to this Court's rule 13.1 and 13.3.

## CONSTITUTIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

46 USC § 181, et seq. The text of the relevant statutes is set forth in the appendix at App. 21a, et seq.

## STATEMENT OF THE CASE

On November 2, 1995, Agustn Panta Pazos died as a result of a severe exposure to methyl bromide gas being used

to fumigate the S/S TAMPA BAY. Mr. Panta had been hired by Afram Carriers, Inc. to stand watch aboard its ship, the TAMPA BAY, while it sat at anchor offshore El Callao, Peru. Most of the vessel's regular crew had been taken ashore prior to the fumigation. In addition to causing Mr. Panta's death, the fumigation also resulted in catastrophic personal injury to Bruce Moeykens, the TAMPA BAY's chief engineer. Several other crewmembers allege that they were exposed to the fumigant when they returned to the ship upon completion of the fumigation. In September 1995, at the commencement of this voyage, Afram had illegally purchased the methyl bromide from Anchor Fumigation & Pest Control, Inc. at the Port of Corpus Christi, Texas. Both state and federal law prohibited Afram from transporting the fumigant to Peru and it was considered unregistered under FIFRA because not accompanied by certain Spanish language labeling required under the Code of Federal Regulations. Facing these and sizable cargo claims from the same voyage, Afram filed a limitation of liability proceeding in Houston on November 14, 1995, prior even to the completion of the voyage. That case remains pending among many parties.

On December 1, 1995, after initiating of the limitation proceeding, Afram Carriers paid the Pantas $2000 to settle their wrongful death claims, incorporating into that settlement a forum selection clause purporting to grant exclusive jurisdiction to the Peruvian courts. The shipowner obtained the settlement with the help of several representatives enlisted to exert pressure on the Panta family to accept the money and sign the release. Afram's lawyer, David Walker, directed the efforts to obtain the settlement from the Pantas, who were at all material times without legal representation. Instead of informing the Pantas about their right to file a claim in the limitation proceeding, Afram's

agents told the Pantas that if they did not accept the money offered to them there would be no possibility of recovery because the ship was gone, Afram was a foreign shipowner and they had no way to sue it. When the Pantas found out about this case and discovered the falsity of Afram's representations, they retained counsel in the United States to pursue their claims.

As noted, Afram filed the underlying limitation of liability proceeding pursuant to 46 U.S.C. § 181 et seq. and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. An order directing the issuance of monition and restraining prosecution of claims was signed on November 20, 1995 and entered on November 21, 1995, the same date that the monitions issued. The order required Afram to notify all claimants, including the Pantas, of the pending limitation proceeding and to publish notice of the order. Rule F contains a similar requirement. Despite the fact that its representatives were actually in contact with the Panta family, Afram ignored its obligations to provide notice. After other personal injury and cargo claimants filed their claims, Afram filed numerous third party complaints seeking contribution and indemnity from at least seven other parties. That litigation remains ongoing.

In April 1997, the Panta claimants filed their motion for leave to intervene. Afram objected on the basis of the "forum selection clause" in the release. The district court apparently treated Afram's opposition as a motion to dismiss and entered an order on June 26, 1997, giving the Panta claimants additional time to submit briefing. App. at 17a. Both parties filed additional briefs and the Pantas submitted affidavit evidence of the circumstances surrounding the "settlement." The court denied the motion for leave to

intervene by order of September 29, 1997, ostensibly without prejudice, ordering the Panta claimants to file a proceeding in the Republic of Peru for the purpose of litigating the validity of the release. App. at 20a. The Panta claimants filed their notice of appeal and statement of issues on October 22, 1997. On January 22, 1998, Judge Benavides granted a motion for expedited appeal. On June 26, 1998, after oral argument, a panel of the Fifth Circuit affirmed and its opinion was revised on July 14, 1998. App. at 1a. On August 20, 1998, the court denied petitioners' timely motion for rehearing and suggestion for rehearing en banc. App. at 16a.

While the case was on appeal, the Pantas sought contingent fee representation to initiate the litigation envisioned by the trial court because their financial situation does not permit them to retain counsel. As it turns out, they could not obtain such contingent fee representation because it is not customary for Peruvian lawyers to represent individuals on a contingent fee basis or to accept contingent fee representation in equitable proceedings. Accordingly, the Pantas were unable to proceed in Peru and the statute of limitations expired on their claims for rescission. They have been informed that Peruvian law does not recognize tolling for the period during which the district court and court of appeals had the case under advisement prior to its dismissal. The undersigned filed Cause Number 98-5608-F against Afram and one of its related corporations in the 214th Judicial District Court, Nueces County, Texas on October 30, 1998.

## REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY BOTH THAT COURTS ARE OBLIGATED TO CONDUCT A FUNDAMENTAL FAIRNESS REVIEW OF FORUM SELECTION CLAUSES, AS WELL AS THE SCOPE OF THE EVIDENCE AND CONSIDERATIONS RELEVANT TO SUCH REVIEW. BECAUSE NO CLEAR GUIDANCE EXISTS ON THIS POINT, THE FIFTH CIRCUIT IGNORED SUBSTANTIAL EVIDENCE THAT SHOWED THIS CLAUSE TO BE FUNDAMENTALLY UNFAIR AND HELD THAT A FORUM SELECTION CLAUSE INSERTED BY A SHIPOWNER IN A WRONGFUL DEATH SETTLEMENT CAN BE ENFORCED TO EXCLUDE ONLY SOME CLAIMANTS FROM A PENDING LIMITATION OF LIABILITY CASE DESPITE THE FACT THAT IT SERVES NO REASONABLE PURPOSE AND TENDS TO CAUSE MULTIPLICITY OF LITIGATION.

In *The Bremen v. Zapata Off-Shore Co.*, this Court broke with a long line of precedent disfavoring forum selection clauses and held that, in an international commercial context, a forum selection clause serves a reasonable purpose, at least absent evidence to the contrary. 407 U.S. 1, 15 (1972). Gradually, forum selection clauses found their way into a variety of other business contexts, as well as into form passenger cruise tickets. In upholding such clauses, this Court has been mindful that the clauses have a potential for causing unfair or unjust results and has accordingly reminded the courts of their obligation to subject

the clauses to "judicial scrutiny for fundamental fairness." *Carnival Cruise Lines vs. Shute*, 499 U.S. 585 (1991). If the Courts admonition to subject forum selection clauses to scrutiny for fundamental fairness is to have any meaning, the courts must be free to examine all of the circumstances surrounding the forum selection clause, including the context in which it arises. The Court should review this case in order to clarify that fundamental fairness review mandates consideration and weighing of all evidence relevant to the creation of the forum selection clause.

The Fifth Circuit in this case did not conduct any fundamental fairness review, but extended its prior ruling in *Haynsworth vs. The Corporation*, 121 F.3d 956 (5th Cir. 1997) to restrict severely the scope of evidence that admiralty courts will be permitted to consider in conducting fundamental fairness review. The extension was unwarranted, because as this Court recognized in *Shute*, "key factual differences preclude an automatic and simple application of *The Bremen's* general principles to the facts here." The panel followed a myopic evidentiary view excluding as "inapposite" any evidence unless it tends to show only a reason why the clause is invalid. This view abdicates the responsibility to determine whether a forum selection clause is reasonable in context and creates the anomalous precedent in this circuit that a litigant will almost always be precluded from attacking a fraudulently induced forum selection clause merely because he also attacks the contract generally. The repercussions are troubling: The decision in this case for example leads to the absurd result that a Houston shipowner, who had already chosen to require all litigation against it to proceed in Houston, can send its Houston lawyers to Peru to unknowingly extract from Peruvian citizens a promise not to sue it in Houston, despite the fact that the sole effect of that promise is to require them

to sue in Peru to determine whether they can come back and sue in Houston. The practical effect of the opinion is thus to reward the defrauding party by permitting it to select the venue most amenable to its fraudulent scheme.

To the extent that the Fifth Circuit has created a body of law under which an admiralty court cannot review the facts underlying a contractual relationship, it has not only repudiated its obligation under *Shute*, but also ignored this Court's decision in *Mosely vs. Electronic Facility*, 374 U.S. 167, 171 (1962). The *Mosely* case, which interpreted the Arbitration Act, is significant because this and other courts have frequently engrafted the reasoning from arbitration clause cases onto forum selection clause cases. This is true despite the fact that--in at least the respect that forum selection clauses are subject to fundamental fairness analysis inapplicable to arbitration clauses--their enforcement is less certain. Nevertheless, in *Mosely* this Court held that a court must consider evidence that an arbitration clause has been used to effect a fraudulent scheme. Specifically, the Court found evidence that, ". . . One of the means used to effect such scheme was . . . the insertion in the subcontracts of an arbitration clause requiring arbitration in New York . . . " *Mosely* recognizes that such evidence may also preclude a valid meeting of the minds regarding the object of the contract itself. Therefore, the court below erred in holding that the Pantas evidence that they were denied the opportunity to make an intelligent forum choice is "inapposite" because the same misconduct **also** induced the settlement agreement. In order to ensure uniformity, the Court should grant the petition for writ of certiorari and make clear that the rule in *Mosely* applies with equal force to forum selection clauses.

The Fifth Circuit has also recently decided *Marinechance Shipping vs. Sebastian* 143 F.3d 216 (5th Cir. 1998), in which it upheld forum selection clauses restricting two seamen from access to U.S. courts. Those seamen have also filed a petition for writ of certiorari raising significant issues about the enforceability of the clauses, including the proper allocation of burden among a seaman and a shipowner. In terms of its rule of decision, *Marinechance*, decided by a different panel the week before this case, provides an interesting contrast because it incorporated at least a rudimentary fundamental fairness review. In fact, the *Marinechance* court distinguished a contrary case solely because the other court did not conduct an inquiry for fundamental fairness. [and] This ignores the Supreme Court's decision in *Carnival Cruise Lines v. Shute*. Apparently ignorant of the *Marinechance* panels reasoning, the same court of appeals decided the instant case without even passing mention of the concept of fundamental fairness. This fact highlights the need for guidance in this area.

Because fundamental fairness is another way of describing "reasonableness" analysis, it is dependent on the facts of a particular case and the appropriate standard must require consideration of circumstances unique to the case. *See Shute*, 499 U.S. at 592. The court of appeals in this case simply failed to account for the distinctions between the role of a forum selection clause in a contract to settle a wrongful death claim and its role in the typical commercial agreement. For example, in a commercial agreement, the role of the clause is generally quite simple: It is intended to assist in resolving potential, but unidentified, future disputes. The parties to such an agreement can reasonably be expected to understand and consider the risks and benefits of the alternative fora, which are totally separate from the risks and

benefits of the underlying transaction, and to reject the entire contract if the forum selection is not to their liking.

On the other hand, when the clause forms part of an agreement to settle a wrongful death claim through immediate payment, there is no equally intuitive expectation that future, but unknown controversies will arise. Therefore, it is unreasonable to assume that, in this case, a grieving widow and her children, having been convinced that they have no remedy but to accept what they have been offered, will spend much time or effort negotiating about forum selection, or that they will be able to fully understand the significance of any choice they make. In contrast, a shipowner and its lawyers have every incentive to include a forum selection clause for the improper purpose of prohibiting the individual or his or her survivors from access to the admiralty courts. Therefore, as a matter of logic alone, the forum selection clause plays a proportionately less reasonable role in such a contract. In addition, because venue, jurisdiction and the ability to execute each exert great influence over the value of a wrongful death claim, any fraud with respect to those issues will necessarily affect the price of the settlement and may even, as in this case, be instrumental in producing an inequitable settlement. This "reality" does not diminish the fact that fraud respecting any of those issues goes to the very heart of a party's ability to form a valid contract regarding the choice of forum. Simply put, in the case of a forum selection, there can be no more clear a case of fraudulent inducement than that in which the enforcing party's fraud has prevented the other from learning about an alternative forum, information essential to the intelligent choice of a forum.

The effect of the absence of clear guidance on the manner of conducting fundamental fairness review becomes obvious when the Court considers the "unfairness" evidence presented by the Pantas. The Pantas adduced uncontroverted affidavit evidence that Afram misrepresented and withheld the truth about the existence of pending, bonded legal proceeding. This evidence, from Ms. Panta and Aframs own lawyer, David Walker, established that the shipowner approached the Panta family within a month of Mr. Panta's death to try to settle this claim. At that time, the family was grieving and financially *in extremis*. Prior to contacting the Pantas and pressuring this settlement, the lawyer had in fact already filed the limitation of liability case. Afram took these actions while under court order to notify the Panta claimants as follows:

> . . . in connection with any death resulting from the voyage of the SS TAMPA BAY, Petitioner shall mail copy of the Notice of Monition, a copy of the Motion, and a copy of this Order, together with a copy of Rule F of the Supplemental Rules for Certain Maritime Claims of the Federal Rules of Civil Procedure to the decedent his or her last known address and to any person who is known to have made any claim on account of such deaths

Despite being in actual contact with the Pantas and under this obligation, Afram's agents used representations about how the shipowner could not be sued to pressure a quick settlement. The only reasonable inference is that Afram obtained the Pantas' settlement to avoid them making claims in the limitation proceeding and inserted the forum selection clause in the contract to prevent the Pantas from having

access to the limitation court where they might attempt to undo the fraudulent settlement. Subsequent events have borne out this inference because the Pantas were not able to pursue the case in Peru and their claim has expired.

The court also ignored evidence that the "settlement" was grossly inadequate. This was probative, though not dispositive, evidence that they were overreached. *See e.g. The Francis Parkman*, 80 F.Supp. 22 (D.C. S.D. N.Y. 1948). This Court places the burden on a shipowner to prove up a seamans release and makes it, ". . . particularly heavy where there has been shown inadequacy of consideration." *Garrett v. Moore-McCormack*, 317 U.S. 239, 252 (1942). In this case, Afram Carriers, Inc. paid a combined total of two thousand dollars ($2,000) (US) to the widow and three children of Agustn Panta Pazos. This was substantially less than a year's earnings for Mr. Panta and by no measure adequate to compensate for the loss of a father, husband, friend and breadwinner. The evidence shows that the entire agreement, including the forum selection clause, which was nothing more than a way of insulating the fraudulent conduct from review by the courts, was the product of overreaching conduct that rendered the forum selection clause unfair. *Mosely*, 374 U.S. at 171.

In addition to the evidence cited above, the panel also ignored a crucial distinction between this case and all the other cases enforcing forum selection clauses: This case involves a clause designed to keep a litigant out of litigation that has been ongoing for more than three years, in which the vast majority of all fact witnesses have already been deposed. This clause does not determine the venue for the entire case, but rather carves out a discrete portion and requires those persons to sue in a different forum. It is not obvious how

excluding certain people from such a proceeding is fundamentally fair, or even intuitively reasonable. Because the opinion below categorically instructs courts to disregard probative evidence, it prevents courts from conducting a full fundamental fairness inquiry. In addition to confusing the state of the law, the Fifth Circuit has countenanced the use of a forum selection clause so far removed from the origins of enforceability and so threatening to the admiralty courts' traditional role as the protector of the rights of seamen as to call for granting the writ.

## II. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO PROVIDE GUIDANCE TO THE LOWER COURTS FOR DETERMINING WHEN ENFORCEMENT OF A FORUM SELECTION CLAUSE VIOLATES PUBLIC POLICY. THE ABSENCE OF A CLEAR RULE HAS RESULTED IN A LACK OF UNIFORMITY IN DECISIONS INTERPRETING CLOSELY ANALOGOUS ISSUES.

Ever since *The Bremen*, this Court has consistently held that forum selection clauses are not enforceable if "enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision. " In *Stewart Organization vs. Ricoh*, 487 U.S. 22, 31 (1988), this court held that in a diversity case subject to 28 USC § 1404(a), which governs transfer of venue, a forum selection clause is not dispositive of whether venue should be transferred for convenience. Implicit in that holding is the concept that the public policy contained in 28 USC § 1404(a) overrides the parties agreement as to a forum. Nevertheless, neither the *Stewart* decision, nor any other decision by this Court, has expressly

decided the standard for analyzing a public policy defense to a forum selection clause. Because no clear substantive standard and methodology have been developed regarding this defense, the Fifth Circuit engaged in a convoluted ad hoc analysis that confuses, rather than clarifies, the issue for future courts. The Court should grant the writ to announce a rule that requires a court to weigh violations of public policy against the reasonableness, in context, of the particular forum clause. Such a rule merely carries out the overarching concept of fundamental fairness, i.e. that the courts should be mindful of the improper use of a forum selection clause.

The issue presented is one of importance beyond these litigants. Analysis such as that employed by the Fifth Circuit, in which a court purports to judge whether a particular statutory policy is strong or weak based on whether the clause also promotes some other public policy, leads to inconsistent results. For example, the opinion below conflicts with the Second Circuits decision in *The Quarrington Court*, which held that the policy of concursus in a limitation proceeding is sufficiently strong to preclude enforcement of a forum clause. In *The Quarrington Court*, 102 F.2d 916, 918 (2d Cir. 1939), the Second Circuit held that a shipowner electing to instigate a limitation proceeding cannot rely on an arbitration clause to compel arbitration of some, but less than all claims against it. The Second Circuit's reasoning is instructive:

> After seeking to limit liability with respect to all claimants, including Isthmian, it cannot be allowed to try the cargo claims in the admiralty court and those of Isthmian before the arbitrators in England.
>
> ***

> We are referred to no decision where the courts have excepted certain claims from adjudication in a limitation proceeding and such decisions as have involved situations like the present, point in a different direction.
>
> ***
>
> Where the proceeding may result in the limitation of the claimants to a single fund, it seems to us desirable to preserve the uniformity of administration which would result from the adjudication of all claims by a single tribunal.
>
> ***
>
> The occasions in which claims may be adjudicated outside of a limitation proceeding are exceedingly rare and we can see no reason for exercising judicial discretion to permit an owner to require arbitration of the rights of one of several claimants.

*Id.* at 919.

Because forum selection clauses and arbitration clauses are analyzed almost interchangeably, the result in *The Quarrington Court* must be considered in direct conflict with the Fifth Circuit opinion sought to be reviewed in this case.

The Fifth Circuit conceded that its conclusion conflicts with *The Quarrington Court*, but disregarded the conflict. App. at 12a. The court did so on the theory that *The Quarrington Court* predates *The Bremen* and therefore must be based on the outdated "ouster" concept. It is plain from the quoted language above, that *The Quarrington Court* had nothing to do with notions of ouster and everything to

do with the policy of concursus, which was the identical issue presented to the Fifth Circuit.

The Fifth Circuit's analysis also conflicts with the result reached by the Tenth Circuit in *Jones vs. Weibrecht*, 901 F.2d 17, 18-19 (10th Cir. 1990). In that case, the court of appeals refused to enforce a forum selection clause that called for litigation in state court over claims subject to the Miller Act. The Tenth Circuit reasoned that a forum selection clause, which addresses only the procedural issue of venue, is insufficiently strong to override the Congressional mandate of exclusive jurisdiction over Miller Act claims. The Tenth Circuit's reliance on the substance-procedure issue is significant because it indicates that the court weighed the purpose of the clause in determining venue against the particular public policy, which governed jurisdiction.

Turning to the specific facts of this case, the Pantas established and the Fifth Circuit conceded, that the forum selection clause violates the public policy of concursus contained in the Limitation Act. App. at 7a (Once the shipowner invokes the protection of a Limitation Act proceeding, all claims subject to the shield should be resolved at one time and by one court."); App. 12a ("Some creditors may be favored over the Pantas because they will have the first chance at the Limitation Act fund while the Pantas are litigating their claim in Peru.). As described by this Court, the public policy of concursus is strong:

> The Court has by its rules and decisions, given the [Limitation Act] a very broad and equitable construction . . . for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that

> all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. . . . [and] looks to a complete and just disposition of a many-cornered controversy . . .

*Hartford Accident Co. v. Southern Pacific*, 273 U.S. 207, 214 (1947). The Court later underscored the strength of this public policy by refusing to permit actions against a shipowner's insurers to proceed outside the limitation proceeding, even though the insurers were not technically parties to the limitation proceeding. The Court reasoned to that to permit such actions:

> . . . would detract from the benefit of a concursus and undermine the operation of the congressional scheme for the "complete and just disposition of a many cornered controversy." . . . Moreover, it is important to bear in mind that the concursus is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are designed to protect injured claimants. They ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages.

*Maryland Casualty Company vs. Cushing*, 347 U.S. 409, 415 (1954). Significantly, this Court cited the fact that some claimants might have a preferential shot at the insurance proceeds as one reason for not permitting these actions to proceed. The Fifth Circuit expressly recognized that

enforcement of the instant clause presents the same problem, as well as violating the exclusivity of the concursus.

The court justified the acknowledged violations of public policy by relying on what it perceived to be the competing public policy of subsidization under the Limitation Act. The panel relied on a logical construct under which if enforcement of a clause both violates the concursus principle and promotes the subsidization principle, the clause must still be enforced:

> Given these two competing policy concerns . . . The more fundamental policy underlying the Limitation Act, i.e. that of providing subsidization to the shipping industry, seems to diminish the strength of the equitable resolution principle and as a result, to prevent it from overcoming the presumption in favor of . . . enforceability.

The court's reasoning in this regard is based on fundamentally wrong predicates: First, as shown above, that the exclusivity of the concursus is not a "strong" public policy and, second, that enforcement implicates the policy of subsidization.

In fact, the statutory policy is not subsidization at any cost, but subsidization of innocent shipowners. In their admiralty treatise, Gilmore and Black note that:

> The holding in the limitation cases which have been decided since the mid-1950s have, with a few exceptions, been adverse to the petitioning shipowner. . . . [T]he argument

> that the Limitation of Liability Act has served its time and should be repealed has become commonplace . . . [The Limitation Act] passed in an era before the corporation had become the standard form of business organization and before present forms of insurance protection ... were available, shows increasing signs of economic obsolescence.

Gilmore & Black, The Laws of Admiralty, 10-4(a) (2nd Ed. 1975). Congress has repealed portions of that statute as it applies to environmental damage. While this petition does not ask the Court to strike down the Limitation Act, the foregoing highlights that the second predicate, that enforcement is permissible because it promotes the subsidization principle of the Act, is not even accurate.

Indeed, the instant case has nothing whatever to do with whether Afram is entitled to subsidization under the terms of the Act. Rather, the only issue before the court is whether the Pantas can sue the ship in Houston or whether they must do so in Peru. In this sense, neither enforcement nor refusal to enforce has any impact on the policy of subsidization unless that determination of forum **alone** dictates the outcome of the underlying claims. If that is indeed the case, then the result conflicts squarely with *Shute's* mandate against clauses used "as a means of discouraging . . . legitimate claims." *Shute*, 499 U.S. at 595. More importantly, the Limitation Act, Rule F and the Court's decision in *Maryland Casualty Company*, make it clear that the relevant authorities, that is Congress and this Court, have already determined that consolidation of proceedings with pro rata access to a fund can coexist with the shipowners potential right to limit.

Missing from the court's analysis of the public policy defense is any deference to the concept of fundamental fairness. That concept suggests strongly that review of this case is needed to instruct the courts that in analyzing a public policy defense to a forum selection clause they must not weigh the public policy against some external standard, but against the reasonableness of the forum selection clause itself. Such a standard would preclude results such as these in which a court ignores the violation of an important public policy in favor of a clause which has the dubious purpose of requiring potential litigants to litigate in a foreign court over their right to sue in an existing proceeding before a United States tribunal.

## III. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO FORMULATE A UNIFORM RULE FOR DETERMINING WHEN A PARTY IS JUDICIALLY ESTOPPED FROM OBTAINING INCONSISTENT RELIEF IN A LEGAL PROCEEDING

The doctrine of judicial estoppel is applied as a matter of public policy. The doctrine prevents internal inconsistency, precludes litigants from "playing fast and loose" with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment." In the context of inconsistent requests for relief, judicial estoppel prevents a party who has knowledge of the benefits and obligations of an order it has sought or accepted from later taking an inconsistent position to avoid the corresponding obligations or effects. *E. g. Kaneb Services, Inc. v. Federal Sav. and Loan Ins. Corp*, 650 F.2d 78, 81 (5th Cir.

1981) (citations omitted); *see also Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 517 (5th Cir 1997).

Notwithstanding, these cases, the Fifth Circuit permitted Afram to flip-flop in between diametrically opposed and successful requests for relief. Thus, the court sanctioned both the shipowner's request for: (1) an order requiring all potential claimants to sue it in the limitation act proceeding and (2) an order preventing certain claimants from suing it in that same proceeding. A clearly announced and uniform rule that precludes litigants from manipulating courts as "best suits their purposes" without regard to consistency of the actions solicited from the court will prevent courts from being used to effect fraudulent schemes.

Because the status of the law on judicial estoppel is confused at best, the Court should grant the petition to announce a clear rule, which is of some importance in the exercise of the courts' inherent powers to protect the integrity of their proceedings. This lack of uniformity is easily demonstrated by the panel's own indecision as to whether the doctrine can even be invoked within a single proceeding. App. at 13a. In addition, some courts of appeals have stated that the doctrine as it exists is lacking "defined principles" and subject to criticism as " basically an 'ad hoc' decision in each case." *Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984); *see also Morris v. State of California*, 966 F.2d 448, 453 (9th Cir. 1991) ("the doctrine of judicial estoppel 'is an equitable doctrine invoked by the court at its discretion'"), *cert. denied*, 113 S. Ct. 96 (1992).

Indeed, the doctrine has not even enjoyed uniform adoption within the federal courts. *Bates v. Long Island Ry. Co.*, 997 F.2d 1028, 1037 (2d Cir.), *cert. denied*, 114 S.Ct. 550

( 1993). The Tenth Circuit, for example, has rejected the doctrine. *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986), as has the D.C. Circuit in *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 113 S. Ct. 3069 (1993) (" we have not previously embraced the doctrine of judicial estoppel in this circuit and we decline to do so in this case.").

Furthermore, even those courts which apply the doctrine are unclear as to its boundaries. The Second and Ninth Circuits have acknowledged as much. *See Bates*, 997 F.2d at 1037 ("elements have never been clearly defined in this Circuit."); *Morris*, 966 F.2d at 452 ("Although this circuit has adopted the doctrine of judicial estoppel, we have not yet determined the circumstances under which it will be applied").

The instant case presents a relatively straightforward application of the doctrine, as the litigant's conduct is blatantly duplicitous and manipulative. As such, it provides the Court with an opportunity to announce a clear rule preventing a party from successfully obtaining mutually exclusive relief in a legal proceeding. This is a question of significance implicating not only the inherent supervisory powers of the court, but also the integrity and public confidence in the judicial process.

## IV. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE PANEL'S FAILURE TO ADDRESS NUMEROUS ISSUES PROPERLY RAISED, PRESERVED AND BRIEFED ON APPEAL SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN

## EXERCISE OF THE COURT'S SUPERVISORY POWER

The accepted course of judicial proceedings on appeal is that the appellate court address and decide each of those issues properly raised, preserved and briefed on appeal. In the instant case, the Fifth Circuit completely failed to address the merits of the judicial estoppel argument raised in section 3 *supra* and failed to address at least two other arguments raised by the Pantas as bases for not enforcing this forum selection clause. Particularly egregious was the panels misrepresentation of the judicial estoppel argument. The Court should grant the petition to correct this fundamental error and its unjust result.

The panel identified the Pantas' judicial estoppel argument as follows:

> The Pantas argue that when it filed its Limitation Act complaint, Afram misrepresented to the district court that there were no other "legal proceedings" underway. The Pantas contend that the subsequent settlement was a "legal proceeding" and that it was in violation of the representations in the complaint.

In fact, the quoted portion of the opinion is an inexplicable and bald misrepresentation of the record. The Pantas have never raised such an argument for judicial estoppel in the appeal of this case. On the contrary, the question presented on appeal was whether:

> Afram was estopped to assert rights under a forum selection clause when it had already invoked the district courts admiralty jurisdiction to resolve a complex limitation of liability proceeding arising from the same fumigation incident in Peru.

The argument continued as follows:

> Afram, with a full understanding of the effects of a limitation of liability proceeding, availed itself of an order from the district court stating that, 'the beginning or continued prosecution of any and all suits, actions, or legal proceedings of any nature or description whatsoever, except in the present proceeding . . . are hereby stayed and restrained...'.... Having made all the other litigants captive to the proceeding it initiated in Houston Afram nevertheless now claims that it can object to the Appellants efforts to have their rights adjudicated in that forum. Under the precedents cited, Afram is estopped from requiring these claimants to file multiple litigations.

As is obvious, the Pantas' position did not rely in any way on misrepresentations in Afram's complaint, rather it posited that a party cannot, after accepting benefits of a statute or order, later take an inconsistent position to avoid the corresponding obligations or effects of the order or statute. This is the same argument that had first been briefed in the trial court and formulated as follows:

> . . . Afram invoked this court's admiralty jurisdiction and specifically requested an order enjoining any other proceedings in this matter. Therefore, Afram is estopped from arguing that any issue relating to the incident at El Callao cannot be litigated in this court

The Fifth Circuit never addressed the Pantas' legal theories or factual contentions on this point of error, but instead manufactured, for want of a better word, a completely different argument that permitted it to reach a desired result. The significance of this real distinction is that the panel ruled against the Pantas on the basis that "They have not demonstrated the court's acceptance and reliance on Aframs misrepresentation." In fact, the record on appeal contained two orders granting Afram mutually exclusive relief on the exact same issue. Consequently, the panel's rejection of the judicial estoppel argument based on its conclusion that there was no evidence of judicial reliance on the alleged misrepresentation is flawed.

In addition, although the panel opinion mentioned in a footnote the Pantas' claim that unilateral mistake barred enforcement of the clause, it totally failed to address that argument. The argument went directly to the inclusion of the forum selection clause in the settlement agreement, was presented to the trial court supported by uncontroverted evidence and properly raised on appeal. Finally, the Fifth Circuit completely ignored the economic duress argument presented. That argument was also properly presented to the trial court and supported by uncontroverted affidavit evidence. It was before the Court of Appeals, and, as noted above, the court was without power to ignore properly

preserved error, supported by evidence and timely brought to its attention.

## CONCLUSION

The Court's intervention is required in order to clarify the proper analysis of fundamental fairness in enforcement of forum selection clauses. If the decision of the Fifth Circuit is permitted to stand, forum selection clauses will continue to proliferate outside their traditional context and into settings in which, by precluding litigants from meaningful access to the courts, they pose a very real danger for grave injustice and unfairness.

For the foregoing reasons, the Pantas respectfully urge that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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**REVISED, July 14, 1998**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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**No. 97-21048**

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**AFRAM CARRIERS, INC., et al.,**

**Plaintiffs,**

**AFRAM CARRIERS, INC.,**

**Plaintiff-Appellee,**

**VERSUS**

**BRUCE MOEYKENS, et al.,**

**Defendants,**

**ADELE NAJAR VDA. DE PANTA,**
**Individually and as Personal Representative of**
**the Estate of Augustin Pantin Pazos;**

**EDGAR PANTA NAJAR,**
**ROSA DEL CARMEN PANTA NAJAR,**
**and**
**ELVIS ANDERSON PANTA NAJAR,**

**Movants-Appellants.**

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**Appeal from the United States District Court**
**for the Southern District of Texas**

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**June 26, 1998**

**Before KING, SMITH, and STEWART, Circuit Judges.**

**JERRY E. SMITH, Circuit Judge:**

This appeal addresses the propriety of a choice of forum clause in a settlement agreement related to a Limitation Act proceeding, 46 U.S.C. § 181 et seq. Finding no reversible error, we affirm.

I.

The S/S TAMPA BAY, a ship owned and operated by Afram Carriers, arrived in the Peruvian port of El Callao, and four employees of the contractual security service, Servipro, hired to guard the ship boarded. Among the four was the deceased, Augustin Panta.

Peruvian port authorities ordered Afram to fumigate the ship. Afram evacuated all crew members except the captain, the chief engineer, and the four Servipro employees. The ship's captain assigned the security personnel to quarters on the ship during the fumigation. While there, Panta, the chief engineer, and several others still aboard were overcome by fumes from the chemical, methyl bromide, used for

fumigation. Panta later died from inhalation of this toxic substance.

Afram and Panta's wife and children entered into a settlement agreement providing that, in exchange for a sum of about U.S. $2000, the Pantas release all existing claims against Afram in both the Peruvian and American courts. The agreement further provides Peruvian choice of law and forum-selection clauses.

At about the time that Afram was settling the Panta heirs' wrongful death claim, it instituted a limitation of liability proceeding under the Limitation Act, 46 U.S.C. § 181 et seq., in federal court and included all personal injury and property damage claimants in its complaint. The district court ordered that monitions be served against all potential claimants in order to give them notice that they needed to present, or forever waive, their rights.

Because of the settlement agreement, Afram did not serve the Panta claimants with a monition. Eighteen months later, however, when they found out about the limitation proceeding, the Pantas moved to intervene and attempted to assert their wrongful death claim against Afram and the TAMPA BAY.

Afram resisted the intervention on the ground that the settlement agreement provided that any disputes arising over the release would be litigated in Peruvian, rather than American, courts. The district court tentatively agreed to enforce the forum-selection clause but allowed the parties to submit additional briefing on the "possible effects that enforcing the forum selection provision would have on the Panta claimants."

After reviewing the additional briefing, the court denied the motion to intervene and dismissed the claims without prejudice if the claimants filed an appropriate action in the Peruvian courts within thirty days. The Pantas appeal the denial of

their motion to intervene.

II.

"[T]he enforceability of a forum-selection or arbitration clause is a question of law which is reviewed de novo." Mitsui & Co. (USA), Inc. v. MIRA M/V, 111 F.3d 33, 35 (5th Cir. 1997) (per curiam) (citations omitted). Forum-selection clauses are presumptively valid: "[A] freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect." M/S BREMAN v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972). "The burden of proving unreasonableness is a heavy one, carried only by a showing that the clause results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court." Mitsui, 111 F.3d at 35 (emphasis added) (citing THE BREMAN, 407 U.S. at 12-13, 15, 18). Allegations that the entire contract was procured as the result of fraud or overreaching are "inapposite to our [forum-selection clause] enforceability determination, which must . . . precede any analysis of the merits [of the contract's validity]." Haynsworth v. The Corporation, 121 F.3d 956, 964 (5th Cir. 1997) (citation omitted), cert. denied, 118 S. Ct. 1513 (1998).

The intervenors attempt to overcome the presumption of the forum-selection clause's validity by arguing that (1) Afram procured the clause through fraud and overreaching (including mistake); (2) the clause violates a strong public policy of the United States; (3) Afram should be estopped from asserting its rights under the clause because it took other, inconsistent positions in this litigation; (4) enforcement of the clause would prevent the intervenors from having their day in court; and (5) the release does not cover the dispute at issue.

A.

The Pantas primarily argue that Afram procured the forum-selection clause through fraud and overreaching. The facts, at least as the Pantas tell the story, are certainly dire. The deceased was the primary breadwinner for his family. He had no life insurance and, by all accounts, his family was financially and emotionally devastated by his death.

In the weeks after the death, the family was offered (although from the record it is unclear who first solicited the offer), and accepted, a cash settlement from Afram. In exchange for about one year's salary, U.S. $2000, the family agreed to waive all claims against Afram in both the Peruvian and U.S. courts. The Pantas further agreed to litigate all disputes concerning the release under Peruvian law and in Peruvian courts.

The Pantas use the facts to facilitate the natural inference that the settlement was procured through fraud or duress or was otherwise unconscionable. From there, we naturally are inclined to make a second inference: The forum-selection clause, as part of the illegally obtained contract, must also have been illegally procured.

This chain of inferences, however, is foreclosed not only by binding circuit precedent, see, e.g., Haynsworth, 121 F.3d at 964; Mitsui, 111 F.3d at 35, but also by the policies underlying the presumption in favor of enforcing such clauses. "The Supreme Court has . . . instructed American courts to enforce [forum-selection] clauses in the interests of international comity and out of deference to the integrity and proficiency of foreign courts." Mitsui, 111 F.3d at 35 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985)). Were we to judge the soundness of the forum-selection clause by what we believe to be the merits of the

underlying contract, we would subvert the aforementioned comity concerns by making a merits inquiry that the Supreme Court has determined is best left to the forum selected by the parties.

Only when we can discern that the clause itself was obtained in contravention of the law will the federal courts disregard it and proceed to judge the merits. Because, in this case, we can draw an inference of an illegally obtained forum-selection clause only if we judge the merits of the contract--that is, the movants have offered no evidence that the clause itself was obtained as a result of fraud or overreaching--we cannot disregard it on that ground.

B.

The Pantas also argue that enforcing the forum-selection clause would thwart the "equitable resolution" goal of the Limitation Act. That is, "[t]he purpose of limitation proceedings is . . ., in an equitable fashion, to provide a marshalling of assets--the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full." Petition of Tex. Co., 213 F.2d 479, 482 (2d Cir. 1954) (internal quotation and citation omitted).

A forum-selection clause is potentially unreasonable when it would undermine a "strong public policy" of the forum. Mitsui, 111 F.3d at 35. Initially, we must determine, therefore, whether the equitable resolution afforded by the Limitation Act is a "strong" public policy that justifies overcoming the forum-selection clause.

The answer is not simple. Admittedly, equitable resolution of claims from a limited fund is one of the policies behind Limitation Act proceedings. See Texas Co., 213 F.2d at 482. Another consideration, however, is promoting settlement and

subsidizing shipbuilders. In fact, most courts have held that the main force driving Congress to enact the Limitation Act was to put American shipbuilders on a competitive footing with their European counterparts by limiting their liability to the value of the ship and her cargo. Because of this fundamental consideration, courts generally have construed ambiguities in the Act in favor of shipowners. See, e.g., Coryell v. Phipps, 317 U.S. 406, 411 (1943).

In this case, the two policies of the statute would appear at loggerheads. On the one hand, the goal of subsidizing shipowners and promoting settlement supports shipowners' ability to use and disregard the Limitation Act proceedings as best suits their interests in settling the claims against them promptly. At the outset, the shipowner was not obliged to invoke the proceeding against all claimants. Had it decided not to invoke the shield, the owner would remain subject to the full extent of liability. Now that it has elected to invoke the shield, the shipowner should not be hampered, before those proceedings get underway, from making a last-minute settlement with one of the claimants, if such a settlement would (1) obtain for it better terms than it could get in the Limitation Act proceeding and (2) not otherwise prejudice the remaining claimants.

On the other hand, the goal of equitable resolution argues against enforcing the forum-selection clause. Once the shipowner invokes the protection of a Limitation Act proceeding, all claims subject to the shield should be resolved at one time and by one court. Arguably, if the shipowner is going to get the benefit of limited liability against the Pantas--even if it is at some later date (such as if and when the Peruvian courts find this agreement unconscionable and thus grant rescission)--then all claimants deserve an equal shot at the limited fund. Otherwise, the shipowner can do indirectly

what it could not do directly--favor some settlement creditors at the expense of others.

Given these two competing policy concerns, it is hard to say that equitable resolution is a "strong" public policy that the enforcement of the forum-selection clause would contravene. The more fundamental policy underlying the Limitation Act, that is, that of providing subsidization to the shipping industry, seems to diminish the strength of the equitable resolution principle and, as a result, to prevent it from overcoming the presumption in favor of the forum-selection clause's enforceability.

C.

The Pantas also claim that Afram should be judicially and equitably estopped from asserting any rights it may have under the forum-selection clause because Afram has taken inconsistent positions on the forum-selection clause matter throughout the Limitation Act proceeding. We disagree.

1.

Judicial estoppel applies to protect the integrity of the courts--preventing a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it. See United States ex rel. Am. Bank v. C.I.T. Constr. Inc., 944 F.2d 253, 258-59 (5th Cir. 1991). "The doctrine of judicial estoppel 'applies in cases where a party attempts to contradict his own sworn statements in the prior litigation.'" Id. at 258 (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988)). "To achieve this purpose, many courts inquire whether the party 'successfully maintained' its contrary position" previously. Id. at 258 (citation omitted).

The Pantas argue that when it filed its Limitation Act complaint, Afram misrepresented to the district court that there were no other "legal proceedings" underway. The Pantas

contend that the subsequent settlement was a "legal proceeding" and that it was in violation of the representations in the complaint.

Assuming arguendo that the Pantas are correct that the subsequent settlement is a "legal proceeding," they still have failed to make an additional showing needed to obtain judicial estoppel: They have not demonstrated the court's acceptance and reliance on Afram's misrepresentation. "[W]e find no evidence in the record that demonstrates [the court's] acceptance of the position taken [by Afram in its complaint]." American Bank, 944 F.2d at 258.

2.

The Pantas' equitable estoppel claim also fails; it appears to be nothing more than a renamed fraudulent inducement claim. The Pantas base their equitable estoppel argument on Afram's failure to disclose to them, when entering into the settlement agreement, that the Limitation Act proceeding was underway. The same conduct also forms the basis for the Pantas fraudulent inducement attack on the entire settlement that we discuss above. See supra part II.A. We rejected that claim because it attacked the entire contract as fraudulently induced, rather than focusing on the forum-selection clause by itself. See id.

Estopping Afram from asserting the forum-selection clause, based on the same conduct underlying the fraudulent inducement claim, would contravene our holding in Haynsworth that allegations that the entire contract was fraudulently induced are "inapposite to [a forum-selection clause] enforceability determination, which must . . . precede any analysis of the merits." Haynsworth, 121 F.3d at 964. Our conclusion is based on the reality that, under a contrary holding, a plaintiff claiming that an entire contract was fraudulently induced

could simply restyle, as a claim of equitable estoppel, his insufficient fraudulent inducement attack on the contract as a whole.

D.

The Pantas maintain that they will be prevented from having their day in court if forced to return to a Peruvian forum, because they cannot obtain contingency-fee counsel in the Peruvian courts and cannot afford to pay a Peruvian lawyer in advance. Therefore, they will be barred from litigating their claim in those courts.

The record contains no information about the Pantas' inability to obtain counsel to represent them in the Peruvian courts. Accordingly, we will not consider that matter.

E.

The Pantas aver that the release does not apply to tort suits that they file outside Peru. The idea apparently is that the release applies only if the Pantas include as part of their cause of action a claim that requires construction of the settlement agreement. If the settlement agreement arises only as an affirmative defense to a tort claim, however, the release provisions do not apply.

There is no error here because the argument relies on our construction of the release to determine whether the release applies only to "cause of action" claims or to all claims in which it might arise. The forum-selection clause, however, dictates that any disagreements about the release must be brought in a Peruvian courts. In short, to address this argument would force us to overlook the forum-selection clause

and to construe the underlying agreement when we are foreclosed from doing so.

AFFIRMED.

1. 1 Specifically, the settlement agreement states:

This Agreement shall be interpreted, governed by, and construed in accordance with the laws of the Republic of Peru and any issue arising out of this Agreement will be subject to the exclusive jurisdiction of the Peruvian courts applying Peruvian law.

2. 2 The Pantas' motion to intervene sought an "intervention of right" under Fed. R. Civ. P. 24(a) because (1) the claim related to the res at issue in the Limitation Act proceeding and because the intervenors had an interest in the res; (2) a denial of intervention would impede their claim to the res; and (3) their rights would not be adequately represented by the other parties in the proceeding (who would be competing for their own shares of the res at the intervenors' expense). See 6 James W. Moore, et al., Moore's Federal Practice § 24.03[1] (3d ed. 1998) (outlining the three requirements to satisfy rule 24(a)). Denials of motions to intervene of right are final orders under 28 U.S.C. § 1291. Accordingly, we have appellate jurisdiction. See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 524-25 (1947).

3. 3 The Pantas argue that they have offered evidence that the forum-selection clause was obtained through fraud: (1) Afram told the Pantas that they could not sue the ship because the shipowner was American; (2) Afram failed to notify the Pantas of this proceeding; and (3) the Pantas would have filed claims in this limitation proceeding, but for the misrepresentations and failures to disclose. This evidence, however, logically goes to the validity of whole settlement

agreement rather than to the forum-selection clause: It explains why the Pantas would not have wanted to settle their claims at all, not why they would not have agreed to the presence of a forum-selection clause. Therefore, although "the plaintiffs claim fraud in the inducement of the [forum-selection] clause[,] . . . nothing in their more specific allegations supports this claim." Haynsworth, 121 F.3d at 970.

4. 4 For the same reasons, the Pantas' claim of mistake falters: They fail to offer any evidence that the clause itself, rather than the entire settlement agreement, was the result of some contract-excusing mistake.

5. 5 See, e.g., British Transp. Comm'n v. United States, 354 U.S. 129, 133 (1957) ("The real object of the act . . . was to limit the liability of vessel owners to their interest in the adventure, and thus to encourage ship-building and to induce capitalists to invest money in this branch of industry.") (internal quotations and citations omitted).

6. 6 See, e.g., id.

7. 7 Underlying the Pantas' "fraud in the inducement" and "contrary to public policy" challenges to the forum-selection clause is their claim of lack of notice of the Limitation Act proceedings. Their alleged lack of notice, however, relates more to Afram's ability to invoke the Limitation Act shield against the Pantas, when and if they are successful in a Peruvian court at overcoming the settlement.

8. 8 Some creditors may be favored over the Pantas because they will have the first chance at the Limitation Act fund while the Pantas are litigating their claim in Peru.

9. 9 But cf. THE QUARRINGTON COURT, 102 F.2d 916, 919 (2d Cir. 1939) ("[A]fter the limitation proceeding has begun steps outside of that proceeding which would affect the

fund should not be allowed [to be carried out through an arbitration clause] for they would involve a negation of one of the important purposes of such proceedings and a well established practice."). THE QUARRINGTON COURT was decided in an era in which forum-selection and arbitration clauses were disfavored by the courts because they were thought to "oust their jurisdiction." In those days, nearly any public policy could undo such a clause. See Richman & Reynolds, Understanding Conflict of Laws § 30, at 77-78 (2d ed. 1993).

By 1972, the Supreme Court had rejected the "ouster of jurisdiction" notion as parochial. See THE BREMAN, 407 U.S. at 9. Now, there is a heavy presumption in favor of such clauses; these days, the barrier has been raised: A strong public policy, not just any public policy, is needed to justify overcoming the presumption in favor of such clauses. See id.; Mitsui, 111 F.3d at 35.

10. 10 See also McNamara v. City of Chicago, 138 F.2d 1219, 1225 (7th Cir. 1998) ("The doctrine provides that a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater.").

11. 11 There appears to be some tension in the doctrine about whether judicial estoppel can bar a litigant from raising an inconsistent position in the same court proceeding, or whether the bar can arise only in a subsequent proceeding. Compare id. (two proceedings assumed) with, e.g., Ergo Science, Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996) (applying the doctrine to a Fed. R. Civ. P. 60 motion for relief from judgment). Because, in the instant case, the conduct does not, in any event, appear to meet the other criteria needed to invoke

the bar, we will assume arguendo that a single court proceeding is sufficient.

12. 12 We assume arguendo that the representations that a plaintiff makes in its complaint are subject to the doctrine of judicial estoppel.

13. 13 See also id. ("The 'judicial acceptance' requirement minimizes the danger of a party contradicting a court's determination based on the party's prior position and, thus, mitigates the corresponding threat to judicial integrity.") (citation omitted).

14. 14 See, e.g., United States v. Gerald, 624 F.2d 1291, 1296 n.1 (5th Cir. 1980) ("It is appellant's responsibility to insure the inclusion in the record of all matters he intends to rely upon on appeal.").

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 97-21048**

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**AFRAM CARRIERS, INC., et al.,**

**Plaintiffs,**

**AFRAM CARRIERS, INC.,**
**Plaintiff-Appellee,**

**VERSUS**

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**Defendants,**

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**and**
**ELVIS ANDERSON PANTA NAJAR,**

**Movants-Appellants.**

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**Appeal from the United States District Court**

**for the Southern District of Texas**

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 06/26/98, 5 Cir., _____ , _____ F.3d _____

Before KING, SMITH, and. Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP. P. and *5TH CIR. R.* 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R.APP.P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED

( ) A member of the court in active service having requested a poll on the *reconsideration* of this cause en banc, and a majority of the judges in active service not having *voted* in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

filed 6/20/97

IN RE the Complaint and Petition of AFRAM CARRIERS, INC., as owner of the 88 TAMPA BAY, her engines, tackle, etc., in a cause of EXONERATION FROM OR LIMITATION OF LIABILITY

Civil Action No. H-95-5235

ORDER

Several individuals have filed a motion for leave to intervene in this action based on the alleged wrongful death of Agustin Pama Pazon ("Parta claimants") According to the Panta claimants, they were never given notice of this action. and their claims arise out of the same events at issue in this case Afram Carriers, Inc. admits that it never notified the Panta claimants of this action, but claims it settled with the Panta claimants The Panta claimants argue that they should have been notified of this action before the settlement agreement was entered, and that the settlement agreement is unenforceable because it was fraudently induced and entered into under conditions of duress.

The Panta settlement agreement contains a forum Agreement shall be interpreted governed by and construed in accordance with the laws of the Republic of Peru and any issue arising out of this Agreement will be subject to the exclusive jurisdiction of the Peruvian courts applying Peruvian law Dkt 121, Exhibit B. Forum selection clauses are presumed valid. M/S Breman v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S. Ct. 2d 1913, 32 L. Ed. 2d 513 (1972);

International Software Systems, Inc. v. Amplicon, Inc., Inc. 77 F.3d 112. 113-15 (5th Cir. 1996). Even when a party claims the contract was fraudently induced, the forum selection clause is normally given effect See International Software Systems 77 F.3d at 113-15 Haynsworth v. Lloyd's of London, 933 F. Supp. 1315, 1323 (S.D. Tex. 1996); Accelerated Christian Edu., Inc v. Orarle Corp.. 925 S W.2d 66, 72 (Tex App --Dallas 1996, no writ). Thus, a forum selection clause will be enforced unless it is clearly shown that enforcement would be unreasonable under the circumstances. M/S Bremen, 407 U.S. at 10, 02 S. Ct. at 1913 Enforcement of a forum selection clause is unreasonable if (1) its incorporation into the contract was fraudelent (2) the fundamental unfairness of the chosen forum's law would deprive the plaintiff of a remedy (3) it would contravene a strong public policy of this forum, or (4) receiving the matter in the chosen forum would be so difficult or inconvenient that it would effectively deprive the plaintiff of his day day court. Haynsworth, 933 F. Supp. at 1321-22 (citing Dorety v. Society of Lloyd's, 3 F.3d 156, 159-60 ("7th Cir. 1993)).

The Panta claimants assert, without authority, that Afram is estopped from enforcing the forum selection clause because it has invoked this Court's jurisdiction to resolve related claims, that it would be unfair to require them to start over with discovewy when discovery has proceeded an far in this case, that they would be unable to obtain discovery from Afram in Peru, and that allowing them to intervene would not expand the scope of this litigation. These assertions do not justify setting aside the forum selection clause However, supposing the settlement agreement were unenforceable, the Court is concerned about the possible effects chat enforcing the forum selection clause would have on the Panta claimants rights with respect to this litigation It is therefore

ORDERED that the Panta claimants may file additional briefing to address the Court's concern within

twenty (20) days of the entry date of this order. Any responses should be filed within ten (10) days thereafter.

6/26/97
s/John D. Rainey
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

filed 9/29/97

IN RE the Complaint and Petition of AFRAM CARRIERS, INC., as owner of the 88 TAMPA BAY, her engines, tackle, etc., in a cause of EXONERATION FROM OR LIMITATION OF LIABILITY

Civil Action No. H-95-5235

Pending before the Court is the Panta Claimants' Motion for Leave to Intervene (Docket #105). After considering the motion response, and supplemental briefing, the Court has decided that the Panta claimants' motion should be DENIED without prejudice, contingent on Afram Carriers, Inc. submitting to jurisdiction in Peru to litigate the validity of the settlement agreement. The Panta claimants shall institute an action in the appropriate Peruvian court within thirty (30) days to invalidate the settlement agreement, otherwise this Order will be with prejudice If the Peruvian court holds that the settlement agreement is invalid, the Panta claimants may file a renewed motion for leave to intervene

SO ORDERED

46 USC App. § 183. Amount of liability

(a) Privity or knowledge of owner; limitation

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) Seagoing vessels; losses not covered in full.

In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) Tonnage of seagoing vessels

For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage:

Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) Loss of life or bodily injury arising on distinct occasions

The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) Privity imputed to owner

In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) "Seagoing vessel" defined

As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this Appendix, the term "seagoing vessel"shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this Appendix, as amended.

(g) Vicarious liability for medical malpractice at shoreside facilities; statutory limitations

In a suit by any person in which the operator or owner of a vessel or employer of a crewmember is claimed to have vicarious liability for medical malpractice with regard to a crewmember occurring at a shoreside facility, and to the extent the damages resulted from the conduct of any shoreside doctor, hospital, medical facility, or other health care provider, such operator, owner, or employer shall be entitled to rely upon any and all statutory limitations of liability applicable to the doctor, hospital, medical facility, or other health care provider in the State of the United States in which the shoreside medical care was provided.

46 USC. App. § 185.

Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of chapter 6 of title 48 of the Revised Statutes and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this Appendix, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this Appendix. Upon compliance with the requirements of this section all

claims and proceedings against the owner with respect to the matter in question shall cease.